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No. 06-726

IN THE

Supreme Court of the United States

E.I. DU PONT DE NEMOURS & CO., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a party that is potentially responsible for cleanup costs under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), and that is ineligible to bring a contribution action under Section 113(f) of CERCLA, *id.* § 9613(f), and this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), has a cause of action under Section 107(a) to recover a portion of its response costs from other potentially responsible parties.

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BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a party that is potentially responsible for cleanup costs under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), and that is ineligible to bring a contribution action under Section 113(f) of CERCLA, *id.* § 9613(f), has a cause of action under Section 107(a) to recover a portion of its response costs from other potentially responsible parties ("PRPs"). *Amicus* has a significant interest in the correct resolution of this question because—consistent with one of CERCLA's principal objectives—it has initiated voluntary remediation activities at sites throughout the United States and could be left without an effective mechanism to recover even a portion of its cleanup costs if the decision below is not reversed.

Lockheed Martin Corporation is one of the world's leading advanced technology and aerospace companies. Approximately eighty-five percent of Lockheed Martin's business is with the United States Department of Defense and various federal agencies. In connection with this work, Lockheed Martin owns or operates a number of facilities that were formerly owned or operated by the federal government or at which work is performed exclusively pursuant to government contracts.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

If left undisturbed, the Third Circuit's holding that PRPs may not bring Section 107(a) cost-recovery actions, even if they are ineligible to pursue a contribution claim under Section 113(f), will have significant financial ramifications for Lockheed Martin and other members of the defense industry. For example, Lockheed Martin has brought suit against the United States under Section 107(a) to recover tens of millions of dollars it expended to remedy the release of hazardous substances from a wartime production facility that the United States operated in Hempstead, New York. *See Lockheed Martin Corp. v. United States*, No. 06-01438 (D.D.C. filed Aug. 15, 2006). Relying on the same arguments endorsed by the court of appeals in the decision below, the United States has moved to dismiss the suit on the ground that, as a PRP, Lockheed Martin is not permitted to recover costs under Section 107(a).

Lockheed Martin has frequently participated as an *amicus curiae* in litigation concerning the right of voluntary remediators to recover costs from other responsible parties under CERCLA. *See, e.g.*, Br. of Lockheed Martin Corporation as *Amicus Curiae* in Supp. of Resp't, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004) (No. 02-1192). Lockheed Martin is concerned that if recovery rights under Section 107(a) were deemed to be unavailable to PRPs, the incentive to undertake voluntary cleanups would be significantly diminished and companies that engage in voluntary remediation would be forced unjustly and unjustifiably to bear costs that are in large part attributable to other parties. Moreover, until this Court authoritatively resolves the circuit split on this issue, Lockheed Martin and similarly situated companies will be forced to develop hazardous waste cleanup programs without the benefit of clear legal rules.

STATEMENT

1. Congress enacted CERCLA in 1980 to respond to the significant environmental and public health hazards posed by

industrial pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). Congress's primary objectives in adopting this comprehensive remedial scheme were to "induce potentially liable persons to voluntarily mitigate damages rather than simply rely on the government to abate hazards," S. REP. NO. 848, 96th Cong., 2d Sess., at 31 (1980), and to facilitate the apportionment of cleanup costs among responsible parties. 126 CONG. REC. 26,338 (1980) (statement of Rep. Florio). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Bestfoods*, 524 U.S. at 56 n.1 (emphasis in original; internal quotation marks omitted).

CERCLA's principal liability provision is Section 107(a), which lists four classes of potentially responsible parties, including the current owner of a facility and the owner or operator of a facility at the time the hazardous substances were released. 42 U.S.C. § 9607(a)(1)-(4). The section provides that these PRPs "shall be liable" for "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." *Id.* § 9607(a)(4)(A).[2] PRPs are also liable for "any other necessary costs of response incurred by *any other person* consistent with the national contingency plan." *Id.* § 9607(a)(4)(B) (emphasis added).

2. In the years immediately following CERCLA's enactment, courts concluded that PRPs could bring an original action to recover remedial costs from other responsible parties pursuant to the plain language of Section 107(a). *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-92 (9th Cir. 1986). There was less certainty, however, about whether the statute authorized a derivative contribution

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[2] The national contingency plan consists in part of regulations promulgated by the EPA to implement CERCLA. *See* 40 C.F.R. pt. 300.

action by "a private entity that had been sued in a cost recovery action (by the Government or by another PRP)." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162 (2004). Congress resolved this ambiguity by enacting the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613. SARA added an explicit contribution cause of action in Section 113(f)(1), which clarified that, "during or following any civil action under [Section 106] or under [Section 107(a)]," a PRP can equitably allocate responsibility for response costs among other PRPs. 42 U.S.C. § 9613(f)(1); *see also id.* § 9613(f)(3)(B) (authorizing parties that have entered into a settlement agreement with the United States or a State to seek contribution from other PRPs).

After SARA's enactment, the lower courts broadly construed Section 113(f)(1) based on the assumption that PRPs could bring contribution actions against other PRPs regardless of whether a preexisting civil action had been filed against them. *See, e.g., In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997). In *Aviall*, however, this Court clarified that contribution actions under Section 113(f)(1) may only be brought "during or following" a Section 106 or Section 107(a) civil action. 543 U.S. at 165. The Court also expressly identified, but left open, the present question—whether PRPs ineligible to file a contribution claim may instead pursue cost-recovery actions under Section 107(a). *Id.* at 169; *see also id.* at 172 (Ginsburg, J., dissenting) (urging the Court to reach the Section 107(a) issue and to hold that PRPs may bring suit under that section). In declining to resolve the question, the *Aviall* Court noted that prior lower-court decisions holding that PRPs cannot pursue Section 107(a) claims might have to be revisited in light of its holding. *Id.* at 169-70.

In the wake of *Aviall*, the circuits have reached inconsistent conclusions regarding the right of voluntary remediators and other PRPs ineligible to seek contribution under Section

113(f) to bring Section 107(a) cost-recovery actions. In addition to the petition for certiorari in this case, there are two other petitions presenting this question that are currently pending before this Court. *See Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005), *petition for cert. filed*, No. 05-1323 (Apr. 14, 2006); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *petition for cert. filed*, No. 06-562 (Oct. 24, 2006).

3. In the decision below, a divided panel of the Third Circuit—explicitly rejecting the reasoning of contrary decisions from the Second and Eighth Circuits—held that a PRP ineligible to bring a contribution claim under Section 113(f) is not entitled to pursue a cost-recovery action under Section 107(a). The panel majority opined that "a PRP seeking to offset its cleanup costs must invoke contribution under § 113" and that "the express cause of action under § 107 (cost recovery) is limited to governments and Indian tribes (acting in their enforcement capacity) and innocent landowners." Pet. App. 26a. The panel majority reasoned that the distinction between innocent parties and non-innocent PRPs is based "on the understanding that, although § 107 is not limited by its terms to innocent parties, the section was designed to enable innocent persons who incur expenses cleaning up a site to recover their costs from potentially responsible persons." *Id.* at 10a (internal quotation marks omitted). Accordingly, the majority continued, "a potentially responsible person does not experience section 107 injury and cannot obtain section 107 relief." *Id.* at 10a-11a (internal quotation marks omitted).

The majority also premised its holding in part on its determination that, when enacting SARA, Congress sought to *discourage* voluntary cleanups not supervised by a government agency. Pet. App. 51a-54a. While acknowledging that "[t]here is, of course, no explicit indication in SARA or the legislative history that Congress was motivated by these concerns," the majority nevertheless contended that the "import of Congress' scheme . . . is consistent with the EPA's wari-

ness of wholly voluntary and unregulated cleanups." *Id.* at 54a.

In dissent, Judge Sloviter endorsed the Second and Eighth Circuits' holdings that a PRP may bring suit under Section 107(a) to recover voluntary remediation costs. She cautioned that "the effect of the majority's opinion will be that parties will be reluctant to engage in voluntary cleanups for fear that they may not be able to obtain contribution." Pet. App. 75a.

SUMMARY OF ARGUMENT

This case is an ideal vehicle for this Court to settle conclusively the question—left unresolved in *Aviall*—whether voluntary remediators and other PRPs ineligible to seek contribution under Section 113(f) of CERCLA may pursue a cost-recovery action against other responsible parties under Section 107(a). Certiorari is warranted because this exceptionally important question has sharply divided the lower courts and directly implicates the twin aims of CERCLA: the promotion of prompt, voluntary cleanups and the equitable apportionment of cleanup costs among responsible parties. The resolution of this question will determine whether private parties will continue to undertake the voluntary remediation of contaminated sites—or will instead wait for the initiation of government enforcement actions before commencing cleanup efforts—and whether hundreds of millions of dollars that have already been expended on voluntary cleanups will be allocated among all liable parties or will instead be borne entirely by those responsible corporate citizens that voluntarily initiated the cleanups.

The Third Circuit's conclusion that PRPs may not bring suit under Section 107(a) directly conflicts with decisions from the Second and Eighth Circuits, and flatly contradicts CERCLA's plain language, legislative history, and statutory objectives. In derogation of this Court's holding in *Aviall* that the plain language of CERCLA must be given controlling

weight, the Third Circuit disregarded Section 107(a)'s unambiguous authorization that "*any* . . . person" who has engaged in the remediation of hazardous waste—including a PRP—may bring an action to recover cleanup costs. 42 U.S.C. § 9607(a)(4)(B) (emphasis added).

CERCLA's legislative history confirms that Congress intended to authorize cost-recovery actions by voluntary remediators in order to facilitate the prompt cleanup of contaminated sites. Indeed, it was well-established when Congress enacted SARA that Section 107(a) cost-recovery actions were available to PRPs that engaged in voluntary remediation. There is no indication in the statutory text or legislative history that, when it amended CERCLA to add the contribution cause of action in Section 113(f), Congress simultaneously intended to curtail the availability of existing cost-recovery actions to parties ineligible to seek contribution. Moreover, the Third Circuit's holding effectively immunizes the federal government from its substantial share of CERCLA liability at the many sites now being remediated on a voluntary basis, in contravention of CERCLA's explicit directive that the federal government receive the same treatment as all other parties responsible for the discharge of hazardous waste.

Because the Third Circuit's legally untenable holding will significantly impede the important objectives that underpin CERCLA and foster substantial regulatory uncertainty, the petition for a writ of certiorari should be granted.

ARGUMENT

I. THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT TO RESOLVE THE CIRCUIT SPLIT REGARDING THE RIGHT OF PRPS TO BRING SUIT UNDER SECTION 107(A).

1. In the aftermath of this Court's holding in *Aviall* that PRPs may only assert a contribution claim under Section 113(f)(1) during or following a CERCLA civil action, a clear and significant circuit split has emerged regarding the right of

PRPs to bring cost-recovery actions under Section 107(a) of CERCLA. In direct conflict with the Third Circuit's holding in the decision below, both the Second and Eighth Circuits have held that PRPs that are ineligible to pursue a contribution claim under Section 113(f) may seek to recover cleanup costs in a Section 107(a) action.

In *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, the Second Circuit held that this issue "is easily resolved based on [Section 107(a)'s] plain language." 423 F.3d at 99. The court explained that "Section 107(a) makes parties liable for the government's remedial and removal costs and for 'any other necessary costs of response incurred by *any other person* consistent with the national contingency plan.'" *Id.* (quoting 42 U.S.C. § 9607(a)(4)(B)) (emphasis added). The court concluded that, in light of *Aviall*, "it no longer makes sense to view section 113(f)(1) as the means by which the section 107(a) cost recovery remedy is effected by [PRPs]. Each of those sections . . . embodies a mechanism for cost recovery available to persons in different procedural circumstances." *Id.* PRPs that cannot bring suit under Section 113(f), the court explained, may instead obtain cost recovery in a Section 107(a) action. *Id.* at 100.

In *Atlantic Research Corp. v. United States*, the Eighth Circuit agreed with the Second Circuit, concluding that "*Aviall* undermines [its prior circuit precedent holding that PRPs may not bring Section 107(a) actions], and the judge-created analytic upon which it relies." 459 F.3d at 833. Following this Court's instruction in *Aviall* to heed CERCLA's plain language, the court "reject[ed] an approach which categorically deprives a liable party of a § 107 remedy" because the court could "find no such limitation in Congress's words." *Id.* at 835. The court also found a right of contribution implied in the language and structure of Section 107(a), recognizing that "nothing in CERCLA's words[] suggest[s] Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of con-

taminated sites, while simultaneously excepting—indeed, penalizing—those who voluntarily assume such duties." *Id.* at 836.

This circuit split warrants the Court's immediate attention. In the absence of a clear rule authorizing voluntary remediators to recover a portion of their cleanup costs from other responsible parties, PRPs will understandably be reluctant to incur further voluntary response costs because, "[w]ithout the benefit of section 107(a)(4)(B), any responsible person who voluntarily comes forward to cleanup a site would be subjected to liability for the entire clean-up cost." *United States v. New Castle County*, 642 F. Supp. 1258, 1264-65 (D. Del. 1986). In order to assure themselves of the ability to recover a portion of their response costs from other responsible parties, PRPs will likely postpone remediation efforts until they either have been sued or have entered into a settlement agreement, which would entitle them to bring a contribution claim under Section 113(f). Moreover, without this Court's guidance, the current judicial confusion regarding the contours of CERCLA's remedial scheme will foster uncertainty in the business community and impede property transactions and corporate acquisitions. It is therefore essential both to the well-being of the Nation's environment and to the vitality of the United States economy that this Court clarify the proper interpretation of Section 107(a) and settle "the significant issue" of its relationship with Section 113(f) left unresolved in *Aviall*. 543 U.S. at 169.

2. Each of the post-*Aviall* circuit court decisions that has addressed the right of voluntary remediators to recover response costs is currently pending before this Court on a petition for a writ of certiorari. This case presents an ideal vehicle for definitively resolving the question left open in *Aviall* because the Third Circuit considered each of the possible remedial avenues potentially available to PRPs ineligible to bring suit under Section 113(f): The court reaffirmed a prior Third Circuit decision holding that Section 107(a) does not

create an express cause of action for PRPs and also explicitly "refuse[d] DuPont's invitation to imply a cause of action for contribution under § 107 or the common law available to PRPs engaged in *sua sponte* voluntary cleanups." Pet. App. 60a. By reviewing the Third Circuit's decision, this Court will thus be able to resolve conclusively whether PRPs ineligible to seek contribution under Section 113(f) have any means of recovering response costs from other parties, including through an express or implied cause of action under Section 107(a) or a right to contribution under the federal common law.

Although neither *Consolidated Edison* nor *Atlantic Research* considers the availability of a remedy under the federal common law and thus does not afford the Court the same opportunity to resolve definitively the availability of a cause of action for voluntary PRPs, the Court may also wish to grant the petitions in one or both of those cases and consolidate them along with the decision below for consideration.

II. THE DECISION BELOW DISREGARDS THE PLAIN LANGUAGE, LEGISLATIVE HISTORY, AND STATUTORY OBJECTIVES OF SECTION 107(A).

This Court's review is also warranted because the Third Circuit's holding that PRPs are categorically foreclosed from bringing suit under Section 107(a) cannot be reconciled with the plain language, legislative history, or statutory objectives of CERCLA.

1. Any analysis of whether PRPs ineligible to file a contribution claim under Section 113(f) can instead seek cost recovery under Section 107(a) should begin, and end, with the unambiguous language of Section 107(a). *Cf. Aviall*, 543 U.S. at 167 ("Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all.").

Section 107(a) describes four categories of persons who are liable under the statute in subparagraphs (1) through (4),

and then states that a party so described "shall be liable" to (A) the United States, States, and Indian Tribes for response costs not inconsistent with the national contingency plan ("NCP"), and (B) "any other person" for response costs consistent with the NCP. 42 U.S.C. § 9607(a)(4)(A)-(B).

Clauses (A) and (B) complement each other, creating a structure that permits government agencies and Indian Tribes to recover costs with a presumption of compliance with the NCP. 42 U.S.C. § 9607(a)(4)(A). Private parties—including PRPs—may also seek recovery under Section 107(a), but bear the burden of proving that any costs incurred are "consistent with the [NCP]." *Id.* § 9607(a)(4)(B). Indeed, on several occasions, this Court has explicitly recognized that Section 107(a) creates a cause of action available to PRPs, explaining in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), for example, that the provision "impliedly authorizes private parties to recover cleanup costs from other PRP's." *Id.* at 818; *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989) (CERCLA "allow[s] private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the *other* potentially responsible parties") (emphasis added), *overruled on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Together, Sections 107(a) and 113(f) create a comprehensive regime that enables all parties who have incurred response costs to recover a portion of those costs from other responsible parties. A PRP who has expended cleanup costs voluntarily or is otherwise ineligible to seek contribution under Section 113(f) because it has not been sued in a CERCLA "civil action" or entered into a CERCLA settlement may seek recovery of its response costs under Section 107(a). A PRP who has been sued in a "civil action under [Section 106] or under [Section 107(a)]" (42 U.S.C. § 9613(f)(1)) or who has settled its liability with the federal government or a State may

bring a contribution claim under Section 113(f) to recover a portion of its cleanup costs from other responsible parties.

Notwithstanding the unambiguous language of Section 107(a)—and this Court's repeated affirmations of the statutory text's plain meaning—the Third Circuit devoted almost no attention to the statutory language. *See* Pet. App. 57a n.32 (rejecting in a footnote *Consolidated Edison*'s reading of the plain language of Section 107(a)). The court instead relied upon a novel interpretation of SARA's legislative history to support its conclusion that voluntary remediators lack a remedy under CERCLA. As discussed below, the Third Circuit's analysis cannot withstand even mild scrutiny.

2. The legislative history of CERCLA and the congressional objectives that animated its enactment confirm that PRPs ineligible to seek contribution under Section 113(f) may bring a cost-recovery action under Section 107(a).

a. Consistent with Congress's intention of "induc[ing] persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites," H.R. REP. NO. 1016, 96th Cong., 2d Sess., at 17 (1980), courts interpreting Section 107(a) before the enactment of SARA recognized the right of PRPs to file cost-recovery actions based upon the statute's plain language. *See, e.g., Wickland Oil Terminals*, 792 F.2d 887; *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982). Nothing in SARA—which was enacted to "clarify and confirm" the existence of a contribution cause of action under CERCLA (S. REP. NO. 11, 99th Cong., 1st Sess., at 44 (1985))—modified the language of Section 107(a) or otherwise evidenced an intention on the part of Congress to abrogate those decisions holding that PRPs may bring suit under Section 107(a).

Congress in fact expressed an opposite desire when enacting SARA by including in Section 113(f)(1) a savings clause, which "rebuts any presumption that the express right

of contribution provided by the enabling clause [of Section 113(f)(1)] is the exclusive cause of action for contribution available to a PRP." *Aviall*, 543 U.S. at 166-67. Indeed, congressional support for voluntary cleanups was unwavering during the consideration of SARA. *See, e.g.*, 131 CONG. REC. 24,730 (1985) (statement of Sen. Domenici) ("One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

b. With this background in mind, it strains credulity to assert—as did the Third Circuit—that, by codifying the right of a PRP to pursue a contribution action after a CERCLA civil action has been filed, Congress intended to restrict the right of those PRPs ineligible to seek contribution under Section 113(f) to file an action to recover a portion of their response costs under Section 107(a). The Third Circuit nevertheless concluded that SARA limited remedial suits to those PRPs who have been found liable in a CERCLA civil action and or who have secured negotiated cleanups under government supervision. The Third Circuit did not claim that this limitation on the availability of Section 107(a) actions appears in the text of CERCLA, did not point to any statements in either CERCLA or SARA's legislative history that explicitly endorse it, and did not cite any court that has agreed with its conclusions. The Third Circuit instead relied on a single law review article written by the prevailing counsel in the *Aviall* case to support the notion that SARA was intended to promote settlements between PRPs and the federal government, to the exclusion of voluntarily initiated cleanup efforts. *See* Wm. Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After* Cooper Industries v. Aviall Services, 18 TUL. ENVTL. L.J. 339 (2005). No other court has adopted the Third Circuit's dubiously supported reasoning. *Cf. Glidden Co. v. FV Steel & Wire Co.*, 2006 U.S. Dist.

LEXIS 70242, at *10 (E.D. Wis. Sept. 21, 2006) (rejecting the Third Circuit's interpretation of SARA).

To be sure, when Congress enacted SARA, it was attempting to encourage settlements. It did so, however, as an alternative to lengthy litigation with the EPA—not as an alternative to voluntary cleanups. In the six years between the initial enactment of CERCLA and its amendment through SARA, protracted CERCLA litigation had been common. PRPs routinely resisted the EPA's cleanup demands, and the EPA was often forced to resort to costly litigation against recalcitrant PRPs. In SARA, Congress "tried . . . to refocus the intent of the [CERCLA] program back on cleaning up the sites and away from the slow and costly litigation." 131 CONG. REC. 24,730 (1985) (statement of Senator Domenici). In so doing, however, Congress did not mandate that all cleanups nationwide be placed under the control and regulation of the EPA. Indeed, Congress was well aware in 1986 that the EPA was not in any position to assume a more comprehensive oversight role.[3] The General Accounting Office had issued numerous reports to Congress regarding the EPA's enforcement of CERCLA. These reports painted a bleak picture of an agency overwhelmed and understaffed, and unable to meet the requirements of CERCLA or the expectations of Congress. *See* Gen. Accounting Office, *Hazardous Waste, Adequacy of EPA Attorney Resource Levels* (GAO/RCED-86-81FS) (1986).

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[3] The House Report accompanying SARA neatly summarizes the situation. *See* H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 55 (1985) ("Under the initial leadership of Assistant Administrator Lavelle, the [CERCLA] program was victimized by gross mismanagement. . . . [After a Congressional investigation,] over twenty top-level officials, including the Administrator of the EPA, resigned or were fired from their jobs. Assistant Administrator Lavelle is currently serving a jail term [for lying to Congress].").

Moreover, the Third Circuit's contention that negotiated cleanups are somehow more protective of the environment than voluntary cleanups is simply mistaken. Voluntary, independent cleanups have always been an integral part of the CERCLA scheme. *See* H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 5, at 58 (1985) ("[v]oluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem"). Instead of imposing a cumbersome bureaucratic review process on every cleanup, CERCLA relies on financial incentives to ensure that voluntary cleanups are thorough and effective. Parties are discouraged from performing unsafe or inadequate cleanups because they will be unable to recover their costs from other parties if they cannot prove that their costs were "necessary" and "consistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(B).[4] Thus, by excluding voluntary PRPs from the ambit of Section 107(a), the Third Circuit's decision neutralizes one of CERCLA's principal tools for promoting environmental remediation.

III. THE DECISION BELOW CREATES A LOOPHOLE THAT ENABLES THE UNITED STATES TO ESCAPE CERCLA LIABILITY.

Certiorari is also necessary for the additional reason that the Third Circuit's holding effectively immunizes the United States from CERCLA liability and therefore significantly undermines CERCLA's ability to bring about prompt hazardous waste cleanups and the equitable allocation of response costs.

The federal government is itself a PRP at numerous sites throughout the country. Indeed, at the end of fiscal year

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[4] Courts routinely review the cleanups underlying Section 107(a) claims to ensure they are necessary and consistent with the NCP. *See, e.g., Carson Harbor Vill. v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006) (Section 107(a) claim denied on the ground that the cleanup violated the public comment requirement).

2002, 158 of the 1,233 sites on CERCLA's National Priorities List—a list of the most-contaminated sites in the Nation—were owned or operated by the United States.[5] Under the Third Circuit's holding, the federal government would effectively be given a veto over the right of other PRPs to recover cleanup costs from it. At any site at which the federal government is a PRP, no private party would be authorized to initiate a contribution claim against it in the absence of a CERCLA enforcement action brought by the federal government or a State. Because it is rare for state regulators to file suit under CERCLA, rather than relying upon state-law remedies, such a rule effectively hands the federal government the keys to its own CERCLA liability and affords the government the power to avoid any liability by declining to initiate enforcement actions. This result is wholly inconsistent with Congress's clear intent that the United States be treated just like a private party under CERCLA. *See* 42 U.S.C. § 9620(a) ("Each department, agency, and instrumentality of the United States . . . shall be subject to . . . this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section [107]").

Indeed, the federal government has consciously pursued a litigation strategy in which it has advocated conflicting legal theories in an apparent effort to minimize its exposure under CERCLA. The United States has previously represented to this Court that the "any other person" formulation in Section 107(a) encompasses PRPs. *See* Br. for the United States as *Amicus Curiae* Supporting Pet'r at 20-21, *Aviall* (No. 02-1192) ("Section 107(a)(1)-(4)(B)'s reference to 'any person' is broad enough to allow one jointly liable party to

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[5] The United States faced $259 *billion* in environmental liabilities at the end of fiscal year 2004. *See* U.S. Dep't of the Treasury, *Financial Report of the United States Government* 69 (2006), *at* http://www.fms.treas.gov/fr/06frusg/06frusg.pdf.

sue another for the former's response costs"). Without a word of explanation for its shifting litigation position, the United States now contends that CERCLA provides *no* remedial rights for voluntary PRPs. *See* United States Pet. for Writ of Cert., *Atl. Research* (No. 06-562).

The United States' inconsistent arguments regarding the ability of PRPs to pursue cost-recovery actions represent only one example of its ever-shifting interpretations of CERCLA. In *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), for example, the federal government argued that Section 107(a) cost-recovery actions cannot be brought by PRPs because contribution claims are available to such parties under Section 113(f)(1). *See* U.S. Br. at 28, *Centerior* (No. 97-3163). Having successfully persuaded several circuits to hold that PRPs cannot pursue Section 107(a) cost-recovery actions by emphasizing the availability of Section 113(f)(1) contribution claims, the government then turned around in *Aviall* and argued that PRPs may not recover voluntarily incurred cleanup costs through the very contribution mechanism that it had previously endorsed before the lower courts.

The government's shifting litigation positions cannot obscure the fact that any interpretation of CERCLA that creates a loophole through which the United States might escape a portion of its extensive environmental liability seriously undermines CERCLA's objectives of remediating hazardous waste and fairly allocating cleanup costs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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